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BMW of North America, Inc. v. Gore: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards

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BMW OF NORTH AMERICA, INC. v. GORE: A TRIAL JUDGE'S GUIDE TO JURY INSTRUCTIONS AND JUDICIAL REVIEW OF PUNITIVE DAMAGE AWARDS

Douglas G. Harkin*

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I. INTRODUCTION

The United States Supreme Court in *BMW of North America, Inc. v. Gore*¹ substantially expanded the scope of federal constitutional review of punitive damage awards by finding the size of punitive damages awarded by the Alabama court so large as to violate federal substantive due process; and by attempting to create what the Court called "guideposts" for judicial review to determine if the amount of a punitive damage award violates the Fourteenth Amendment's Due Process Clause. The *BMW* decision is troubling to state courts because for the first time, the Supreme Court struck down a punitive damage award because the size of the award violated substantive due process. The *BMW* decision subjects state court awards of punitive damages to federal constitutional scrutiny but provides little guidance to help state courts determine just what level of award will pass due process muster.²

Prior to *BMW*, relying on earlier Supreme Court decisions, many state legislatures and appellate courts attempted to develop criteria which must be considered by the jury when awarding, and by state courts when reviewing, punitive damage awards. No matter how well intended and comprehensive the criteria, *BMW* places the state standards at risk of violating federal substantive due process if they exclude, overemphasize, de-emphasize, or improperly expand the "guideposts" which

1. 517 U.S. 559 (1996).

2. Complicating the issue is the fractured nature of the *BMW* decision; both the five member majority and three member concurring opinion (a majority of the majority) emphasized different criteria for the evaluation of punitive damages and failed to explain why the identical Alabama guidelines had been misapplied in *BMW* but properly applied in the 1991 decision of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). The two dissenting opinions chided the majority for their failure to provide any guidance to state courts and for getting involved in an area of the law which should rightly belong to the states.

BMW found to be critical to the evaluation of punitive damage awards. The trial judge involved in a case that may go to the jury on punitive damages must be prepared to rule on the admissibility of damage-related evidence, properly instruct the jury regarding the matters it may consider when setting the level of punitive damages, subsequently conduct a meaningful review of the jury verdict and articulate the reasons why the jury award is affirmed or modified. Counsel preparing for trial and conducting settlement negotiations "in the shadow of the law" must know what evidence should be discovered and will be admitted at trial and then counsel must defend, or challenge, a punitive damage award in the event the case presents a *BMW* due process issue.³ Both the trial court and counsel need to know what evidence is legally relevant to the amount of punitive damages to be awarded, the appropriate weight to be given to that evidence, and a general sense of when a punitive damage award is simply too large given the circumstances of the case.

The debate over punitive damages continues to spark claims that punitive damage awards are "out of control."⁴ Despite a history of awarding punitive damages dating back over hundreds of years,⁵ critics of punitive damages claim that not only are juries incompetent⁶ and biased,⁷ the confusing common law of punitive damages leads to irrational and inconsistent jury and appellate decisions.⁸ These concerns have led the Supreme

3. See 28 U.S.C. § 1257 (1998) (providing for a direct appeal to the United States Supreme Court by application for a writ of certiorari). The United States Supreme Court may vacate the state court decision and remand for further consideration in light of the *BMW* opinion. See *Apache Corp. v. Moore*, 517 U.S. 1217 (1996) (removing) and *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex. App. 1997) (considering further). See also *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) (holding that federal district courts do not have jurisdiction "over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional").

4. See John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986).

5. See Paul M. Sykes, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore*, 75 N.C. L. REV. 1084 (1997) (noting Exodus 22:4, requiring double restitution for the crime of theft); 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 1-3 (3d ed. 1995) (noting the existence of punitive damages in the Code of Hammurabi in 2000 B.C.).

6. See Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089, 1127-29 (1996).

7. See Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 164-70 (1991).

8. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting).

Court to periodically address procedural and substantive due process aspects of the punitive damage question and state legislatures to implement punitive damage reforms.

Despite the *BMW* decision, it has become clear that the Supreme Court will not provide definitive rules to guide trial courts in assessing and reviewing punitive damage awards. Deserving punitive damage claims, demands for more punitive damage reform, vaguely worded Supreme Court substantive due process guideposts, and legitimate state interests in punishment and deterrence of outrageous conduct combine to create a trial replete with potential error which could cause an expensive and justice-delaying retrial. Counsel and the trial judge armed with a working knowledge of the issues likely to arise during a punitive damage trial must develop a trial plan that addresses problems prior to the time of their usual trial appearance. A valuable secondary gain to the legal profession of careful attention to integrating constitutional mandates with state standards is the development of a body of state practice which balances constitutional guarantees with the punitive damage interests of the state.

The recent punitive damage reforms adopted by many states attempt to limit punitive damages to their proper purpose and help juries reach appropriate verdicts. These punitive damage reform efforts generally address what have been called the primary goals of punitive damage reform: complying with Constitutional guarantees; maintaining effective deterrence and punishment; promoting stability; reducing the chilling effect of punitive damages on businesses' research, innovation, and competitiveness; eliminating the windfall aspect of punitive damages; and improving the administration of the punitive damages system.⁹

This article provides a brief history of the development of the constitutional punitive damage aspects, a "heads up" on the due process issues that are likely to arise during the trial, and an understanding of the duties imposed on the trial judge when reviewing a punitive damage award. Section II surveys the purpose of punitive damages and reviews the three primary decisions of the U.S. Supreme Court preceding *BMW*, decisions which laid the framework for the procedural requirements of a punitive damages trial. Section III examines in some detail the

9. See *Development in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1536 (1997).

BMW decision by the U. S. Supreme Court which elevated the *amount* of a punitive damage award to a federal substantive due process level; the reaction to *BMW*; and the reasoning of the concurring opinion. Section IV discusses the due process aspects of *BMW*, its “shadow” effect on settlement practices, and its application in subsequent court decisions. Section V considers state standards for punitive damage awards and the various ways that state courts have reviewed such awards with respect to state standards and *BMW* guideposts. Section VI advances the due process reasons for expanding the jury instruction to achieve “reasonable constraints” and considers the various approaches which a trial court and appellate court may take as they review a jury award of punitive damages. Section VII examines the punitive damage procedure in Montana and neighboring states. Section VIII offers suggestions for drafting instructions and reviewing punitive damage awards and recommends changes to Montana’s current jury instruction and trial court review procedure. Appendix A contains a summary of the *Green Oil/Haslip* factors, *BMW* guideposts, and Model Punitive Damage Act suggestions. Appendix B contains a proposed Montana Jury Instruction for setting the amount of punitive damages.

II. HISTORY OF PUNITIVE DAMAGES

A. Public Policy Considerations

Punitive damages, commonly called “exemplary” damages, are awarded to punish and deter extreme and outrageous conduct. They are awarded in addition to the amount necessary to compensate the injured party and stand in marked contrast to compensatory damages, focused largely on the defendant’s conduct rather than the extent of injury to the plaintiff. The traditional twin goals of punitive damages, punishment and deterrence, have become enlarged to encompass a wide range of public policy goals. The essential focus of punitive damages is on deterring morally repugnant conduct by a method short of criminal sanction, encouraging large corporations from taking advantage of less powerful adversaries, serving a private prosecutorial function by making claims of small financial value worthy of litigation, rewarding the plaintiff for bringing the defendant to justice, and providing a method for payment of plaintiff’s attorney fees without reduction of the compensatory

award.¹⁰

Critics of punitive damages argue that the uncertainty of punitive damage awards creates a negative climate for business and increases the cost of production by over-estimating the expected value of liability exposure. Businesses are unwilling to take the risks necessary to develop potentially beneficial products and unwilling to take unnecessary precautions. Insurance to cover punitive damage claims is often unavailable and, when available, extremely expensive. Settlement costs in punitive damage claims are increased because of the ripple effect of large awards, which encourage others to file suit. Punitive damage awards constitute a windfall for plaintiffs.¹¹

Public perception of frequent and large punitive damage awards has created a great debate over the propriety of punitive damages.¹² Impassioned as the arguments become, the statistics suggest that juries are not out of control when they award punitive damages. In the 1992 Civil Justice Survey of State Courts conducted by the Department of Justice and the National Center for State Courts, only two percent of the 762,000 cases resolved by trial, settlement, or some other method in the nation's seventy-five largest counties were decided by juries. When a jury did decide a case and the plaintiff won, there was only a six percent chance that the jury would award punitive damages. Half of the those awards were under \$50,000.¹³

Regardless of the ongoing debate over the merits of punitive damages, it is clear that juries will continue to award punitive damages to punish and deter. As noted by the United States Supreme Court in 1851, the availability of punitive damages "will not admit of argument."¹⁴

B. Basic Elements of a Punitive Damages Action

Punitive damages may be recovered in an ever-expanding range of civil actions¹⁵ but are generally not permitted in

10. See Sabrina C. Turner, *The Shadow of BMW of North America, Inc. v. Gore*, 1998 WIS. L. REV. 427, 429-31.

11. See *id.* at 430-31.

12. See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 1-7 (1995).

13. See Richard C. Reuben, *Plaintiffs Rarely Win Punitives, Study Says DOJ Survey of State Civil Verdicts Praised for Depth, Criticized for Emphasis*, 81 A.B.A.J. 26 (1995).

14. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

15. See generally PUNITIVE DAMAGES AND BUSINESS TORTS: A PRACTITIONER'S

contract actions or claims based on statutory causes of action. Certain contract-based actions, particularly those involving a breach of the duty of good faith and fair dealing arising from a special relationship between the parties, will support a claim for punitive damages.¹⁶

Although punitive damages are not generally allowed in negligence claims, an allegation of gross negligence will often support a punitive damage claim.¹⁷ Products liability actions are a frequent source of punitive damage claims and many important state decisions in this area have led to the development of criteria for jury assessment of punitive damages.¹⁸

When a tort claim is combined with a contract action, as in tortious interference with a contract, punitive damages are permitted. The plaintiff must generally show a specific intention to harm and such tortious interference claims have resulted in some of the largest punitive verdicts.¹⁹ State law will generally identify the type of actions that either permit, or prohibit, a claim for punitive damages.²⁰

Punitive damages can be recovered only when the defendant's conduct is accompanied by aggravating factors. While there are many different formulations of the standard for punitive damage liability, the primary principle is the defendant's consciousness of wrongdoing or awareness of conduct from which harm can reasonably be expected to flow.²¹ The courts often describe the standard of liability by the use of various adjectives; such as, willful, wanton or malicious; reckless, oppressive or fraudulent; or fraudulent, malicious, grossly negligent, oppressive or with evil motives.²²

The burden is upon the plaintiff seeking punitive damages to prove that the defendant's conduct merits such an award. The burden of proof is generally established by the law of the

HANDBOOK (Thomas J. Collin ed., 1998) [hereinafter PRACTITIONER'S HANDBOOK].

16. See *Jackson Nat'l Life Ins. Co. v. Receconi*, 827 P.2d 118 (N.M. 1992).

17. See generally SCHLUETER & REDDEN, *supra* note 5, § 9.3 (A).

18. See *id.* at § 9.5(A).

19. See *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 809 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

20. See, e.g., MONT. CODE ANN. § 27-1-220 (1997) (prohibiting punitive damages arising from contract or breach of contract). However, the preceding limitation does not prohibit recovery of punitive damages in a products liability action. See MONT. CODE ANN. § 27-1-220(2) (1997).

21. See PRACTITIONER'S HANDBOOK, *supra* note 15, at 38.

22. See MONT. CODE ANN. § 27-1-221(1) (1997) (actual fraud or actual malice).

jurisdiction and may be by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt.²³

As a general rule, punitive damages cannot be awarded in the absence of compensatory damages. Although some states require an award of actual damages, others allow punitive damages when there is an award of nominal damages or a showing of harm or injury even if the jury does not award actual damages.²⁴

Many states have adopted the requirement that trials involving punitive damages are subject to the rule of trial bifurcation. This procedure divides a trial into two stages with the fact-finder making determinations in both parts. The variations include separate proceedings involving compensatory damages and punitive damage issues²⁵ and/or separate proceedings for determination of punitive liability and for setting the amount of the award.²⁶ Bifurcation can be mandatory in all punitive damage cases upon the request of either party.²⁷

The purpose of bifurcation is to prevent jury confusion and prejudice during the determination of liability. The defendant's wealth or other bad acts, relevant considerations in the determination of the amount of the punitive award, are not proper matters for consideration during the jury's deliberations on liability for compensatory damages. Further, since trials involving punitive damage claims often involve different standards of proof, such as preponderance of the evidence for the compensatory claim versus clear and convincing for the punitive claim, and different numbers of juror agreement, such as two thirds for compensatory damages and unanimous for punitive damages,²⁸ bifurcation helps to substantially reduce juror

23. See IDAHO CODE § 6-1604(1) (1998) (requiring proof by a preponderance of the evidence); MONT. CODE ANN. § 27-1-221(5) (1997) (requiring proof of clear and convincing evidence); COLO. REV. STAT. § 13-25-127(2) (1998) (requiring proof beyond a reasonable doubt).

24. See Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R.4TH 11, at § 4 (1986). See also *Weinberg v. Farmers State Bank of Worden*, 231 Mont. 10, 752 P.2d 719, 732-33 (1988) (after recognizing that punitive damages may be awarded where plaintiff is granted nominal damages, so may punitive damages be awarded where no monetary value has been assigned to the actual damages suffered).

25. See MONT. CODE ANN. § 27-1-221(7) (1997).

26. See NEV. REV. STAT. ANN. § 42.005(3) (Michie 1997).

27. See MONT. CODE ANN. § 27-1-221(7) (1997).

28. See *id.* § 27-1-221(6). However, at least one Montana district court judge has ruled that Montana's unanimous verdict requirement for punitive damages is unconstitutional. See *Order Granting Plaintiffs' Motion in Limine and Denying*

confusion and consideration of improper evidence.

A nearly universal rule is that the fact-finder, whether judge or jury, who determined the entitlement to punitive damages, sets the amount of the award.²⁹ Only Kansas and Connecticut separate the finding by the jury as to whether punitive damages should be awarded from the duty imposed on the judge to set the amount of the award.³⁰

C. Pre-BMW U.S. Supreme Court Punitive Damage Cases

A review of pre-*BMW* decisions by the U.S. Supreme Court suggests that the Court may have seen *BMW* as an opportunity to set the parameters for excessive punitive damage awards. Until *BMW*, the Court's limit on punitive damages was a vague standard of a "general concern of reasonableness."³¹ The primary issue presented in *BMW* was the constitutional guarantee that the government may not deprive citizens of their property without due process of law. Despite brief mention in several cases early in this century that due process protection might extend to the assessment of excessive financial penalties,³² and recent hints that the Court would entertain due process challenges to large punitive damage awards,³³ the Court was not squarely faced with a due process claim until *Pacific Mutual Life Insurance Co. v. Haslip*.³⁴

In *Haslip*, the agent for Pacific Mutual accepted insurance premium payments without forwarding them to the company.

Defendant's Motion in Limine Re Constitutional Right to Two-Thirds Jury Verdict on Punitive Damages Claim, *Finstad v. W.R. Grace & Co.*, Nos. DV-98-138, 139, 142 (19th J. Dist. Ct. Apr. 30, 1999).

29. "Liability for punitive damages must be determined by the trier of fact, whether judge or jury. An award of punitive damages must be unanimous as to liability and amount." MONT. CODE ANN. § 27-1-221(6) (1997).

30. See KAN. STAT. ANN. § 60-3701(b) (1997); CONN. GEN. STAT. § 52-240b (1999).

31. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

32. See *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 77 (1907); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

33. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The Court did not address the claim of excessiveness under the Fourteenth Amendment because it was not raised in the lower court. See *id.* at 258. However, Justice Brennan, joined by Justice Marshall, made it very clear when he stated:

I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties

Id. at 280.

34. 499 U.S. 1 (1991).

The agent also failed to forward notices of policy cancellation to the policyholder. The U.S. Supreme Court approved punitive damages of \$840,000 and compensatory damages of \$200,000 and cited with approval Alabama's common-law approach for assessing punitive damages. Alabama's system provided that the jury was to be instructed to consider both the seriousness of the defendant's act and the need to deter similar wrongful conduct. The Alabama trial court and appellate court then reviewed the award to ensure its reasonableness. The Court held that due process was provided if the standards applied by the state trial and appellate court impose a "sufficiently definite and meaningful constraint" on a jury's discretion in awarding punitive damages. These standards must ensure that any award does not exceed an amount that will accomplish the goals of punishment and deterrence.

After finding that the procedure used to assess and review the punitive damage award afforded Pacific Mutual an adequate safeguard of their due process rights, the Court noted that the punitive damage award of four times the amount of the compensatory damages was "close to the line" of constitutional impropriety. The use of this language by the Court led many commentators to conclude that the Court had finally set a due process limit for punitive damages of four to five times the actual damages as the point at which to begin heightened due process scrutiny. Some courts considered *Haslip* as authority to expand appellate review of punitive damage awards while others considered that the only *Haslip* requirement was that the punitive damage award be reasonable and rational.³⁵

Of particular interest in *Haslip* was the Court's application of the factors first approved by the Alabama Supreme Court in *Green Oil Co. v. Hornsby*.³⁶ The *Haslip* decision required the objective application of the *Green Oil* factors so as to create a "definite and meaningful constraint on the discretion of the fact finders in awarding punitive damages."³⁷ The *Green Oil/Haslip* factors require consideration of the following criteria:

- (1) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the

35. See *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993).

36. 539 So.2d 218, 223-24 (Ala. 1989).

37. *Haslip*, 499 U.S. at 22.

defendant's conduct as well as the harm that actually has occurred;

- (2) The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
- (3) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss;
- (4) The "financial position" of the defendant;
- (5) All the cost of litigation;
- (6) The imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and
- (7) The existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.³⁸

Two terms after *Haslip*, the Court decided *TXO Production Corp. v. Alliance Resources Corp.*³⁹ and upheld a punitive damage award of \$10 million and a \$19,000 actual damage award for slander of title. TXO had intentionally created a cloud on the title of property owned by Alliance in order to reduce its royalty payments and increase its oil and gas rights. The Court held that in light of both TXO's reprehensible conduct and the large potential loss to Alliance Resources Corporation, the punitive damage award was not so "grossly excessive" as to be beyond the power of the state to allow.⁴⁰ The fact that the award was upheld by the trial judge and the appellate court gave rise to a strong presumption of validity, provided that fair procedures were followed. Retreating to the language of *Haslip*, the Court refused to "draw a mathematical bright line" while

38. *Id.* at 21-22.

39. 509 U.S. 443 (1993).

40. *Id.* at 462.

maintaining "that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus."⁴¹

Clearly concerned about the lack of clear guidance to courts regarding the standards for assessing punitive damages, Justice O'Connor dissented, noting that "[d]eprived of any fixed landmarks and guideposts, any of us can be distracted, played on, and befuddled to the point where our best guess is far from reliable."⁴² Foreshadowing the multiple concurring and dissenting opinions soon to appear in *BMW*, Justice Kennedy did not agree with the plurality's discussion of the substantive requirement of due process in terms of whether an award was grossly excessive. Rather, he believed that the focus should be on the reasons for the punitive damage award. Because the jury in *TXO* based the punitive damages on TXO's malice, Justice Kennedy concurred in the judgment but with a "certain degree of disquiet in affirming [the] award."⁴³ Because of the wide range of concurring and dissenting opinions⁴⁴ in *TXO*, the Court did not adopt a true constitutional due process standard for assessing punitive damages. However, *TXO* did demonstrate the Court's agreement on the basic theory that due process places *some* substantive limit on punitive damage awards.

Seeking to further refine the *Haslip* procedural requirements, the Court in *Honda Motor Co. v. Oberg*⁴⁵ struck down Oregon's method of assessing punitive damages because it failed to include post-trial judicial review. The Court, noting that the problem was not with the character of the standard for identifying unconstitutional and excessive awards, but with the procedures that were necessary to ensure that punitive damages are not imposed in an arbitrary manner,⁴⁶ required judicial review as an essential element of due process. Calm and reflective judicial review provides the restraint needed because "jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses,

41. *Id.* at 458 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

42. *Id.* at 475.

43. *Id.* at 443.

44. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (three joining Justice Stevens' plurality opinion, three joining Justice O'Connor's dissent, and Justice Kennedy concurring in part).

45. 512 U.S. 415 (1994).

46. *See id.* at 420.

particularly those without strong local presence.”⁴⁷

Just prior to *BMW*, the attitude of the U.S. Supreme Court toward large punitive damage awards was mixed, but indicated grave concern about excessive awards. *Haslip* provided procedural limitations on the assessment of punitive damages. The Court expressly approved Alabama’s common law procedure but approval is not the same as fulfilling a due process requirement. In *Haslip*, the Court seemed to require that juries exercise their discretion within “reasonable constraints”⁴⁸ and that the award not entirely lack “objective criteria.”⁴⁹ *Honda* reemphasized the need for judicial review, a requirement clearly mandated by *Haslip*. *TXO* was the most valuable of the pre-*BMW* cases because it signaled the size of a punitive damage award as potentially violating substantive due process.

III. BMW OF NORTH AMERICA, INC. V. GORE

A. Majority Guideposts

In *BMW*, a five to four decision, the U.S. Supreme Court reversed a punitive damage award of \$2 million that the Alabama Supreme Court had approved. The Alabama Supreme Court had reduced the original jury award from \$4 million to \$2 million.⁵⁰ The punitive damages were assessed against the automaker, BMW of North America, Inc., because BMW failed to disclose that it had repainted Gore’s car prior to sale. The jury also awarded \$4,000 in compensatory damages.⁵¹ The bases for the Court’s reversal of the punitive damage award were largely grounded on due process considerations.

Much of the academic commentary that followed the *BMW* decision expressed concern over the failure of the decision to provide guidance to either state courts or legislatures.⁵² The lack

47. *Id.* at 432.

48. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

49. *Id.* at 23.

50. 646 So. 2d 619 (1994).

51. *See id.* at 621-22.

52. *See generally* Michael Andrews, Comment, *Constitutional Law—Punitive Damages: The U.S. Supreme Court Uses the Due Process Clause of the Fourteenth Amendment to Strike Down a Two Million Dollar Punitive Damages Award BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), 73 N.D. L. REV. 299 (1997); Rob S. Register, Note, *BMW of North America, Inc. v. Gore: The Supreme Court Rejects a Punitive Damage Award on Due Process Grounds*, 48 MERCER L. REV. 1273 (1997); Thomas R. Calcagni, Note, *Constitutional Law—Fourteenth Amendment—Due Process*

of clear criteria for evaluating the appropriate level of punitive damages was heightened by the sharp division within the Court.⁵³ While the five member majority grounded their decision on "substantive due process," the concurring opinion (a majority within a majority) used a procedural approach that emphasized factors that would limit the amount of punitive damages. The four dissenting justices remained convinced that the Constitution imposes no substantive limits on the size of punitive awards and suggested that the Court should leave this area of the law to the separate states.

The Court began by commending the Alabama Supreme Court for reducing the punitive damage award to \$2 million because the jury had improperly taken into account the defendant's actions in other states as a punitive damage multiplier. The majority held the punitive damage award to be "grossly excessive" under the Due Process Clause of the Fourteenth Amendment and remanded the matter back to the Alabama Supreme Court for further consideration.⁵⁴

The majority opinion in *BMW* held that a state must give fair notice to persons that certain conduct will subject them to punishment and the degree of severity of the sanction. In deciding that fair notice had not been given and the punitive damage award was grossly excessive, the Court framed its analysis in terms of notice to the defendant, a concept generally associated with procedural due process. With notice as the primary consideration, the Court identified three "guideposts" to determine whether notice had been effected: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the actual and potential harm and the punitive damages award;

Clause Requires That a State Provide Fair Notice of the Magnitude of a Punitive Damages Award Assessed Against a Tortfeasor—BMW of N. Am. Inc. v. Gore, 116 S. Ct. 1589 (1996), 27 SETON HALL L. REV. 708 (1997); *The Supreme Court, 1995 Term—Leading Case, Civil Forfeiture—Innocent Owner Defense*, 110 HARV. L. REV. 135, 145, 151, 152 (1996); and Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore*, 75 N.C. L. REV. 1084 (1997).

53. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (the five member majority opinion was followed by a three member concurrence, a two member dissent, and another two member dissent).

54. Under the Commerce Clause aspect of *BMW*, the Court held that a single state cannot impose that state's automobile sales disclosure requirements on other states by allowing juries to award damages in lawsuits brought in that state based on out-of-state actions of the defendant. The Court noted with approval that the Alabama Supreme Court had properly removed out-of-state considerations when they discounted the original award of \$4 million to \$2 million. The Alabama Supreme Court held that the jury had incorrectly based its award upon a multiplication of \$4,000 (the compensatory award) times 1000 (the number of refinished vehicles sold in the United States).

and (3) sanctions for similar misconduct. The guideposts will now form the basis for determining whether a jury award of punitive damages is excessive. Although the guideposts are couched in general terms, the Court expanded on how they are to be viewed in reviewing punitive damage awards.

Guidepost I: Degree of reprehensibility. The Court said that the degree of reprehensibility is the most important indicator of the reasonableness of punitive damages. The idea that the punishment should fit the crime is a deeply rooted principle of common law jurisprudence and reflects the universally accepted view that some wrongs are more blameworthy than others. The Court then proceeded to describe a hierarchy of reprehensible conduct:

- (1) Nonviolent crimes are less serious than crimes marked by violence or the threat of violence,
- (2) Intentional trickery and deceit are more reprehensible than negligence,
- (3) Economic harm is less reprehensible than physical harm,
- (4) Repeated acts of prohibited conduct while knowing or suspecting that it was unlawful are more reprehensible than one instance of malfeasance, and
- (5) The omission of a material fact is less reprehensible than deliberately making a false statement. This is particularly true when there is a good-faith basis for believing that no duty to disclose exists.⁵⁵

Guidepost II: Ratio of punitive damage award to compensatory award. The Court reiterated that exemplary damages must bear a "reasonable relationship" to compensatory damages, but a constitutional line cannot be marked by a simple mathematical formula. The size of the award can be one indication that the punitive damage award resulted from bias,

55. *BMW*, 517 U.S. at 575-80.

passion or prejudice. However, it is not the sole nor the most important sign. The Court noted that the punitive damage award should consider not only the harm actually done, but the harm likely to result from the defendant's conduct. The size, small or large, of the compensatory damages could support large punitive damages; the punitive damage award is entirely dependent on the facts of the case. This point was aptly made when the Oregon Supreme Court said:

In *BMW*, the United States Supreme Court stated that, in some circumstances, low compensatory damages might support a higher ratio of punitive damages than would high compensatory damages, presumably on the ground that a high compensatory damage award would have a significant deterrent effect, making a high punitive damage award less necessary to deter misconduct. We conclude, however, that, in other cases, high compensatory damages may themselves be evidence of the egregiousness of the defendant's conduct and might, therefore, support a high ratio as well.⁵⁶

The *BMW* Court further noted that a higher ratio may be justified in cases where the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. In concluding its consideration of the ratio aspect of the punitive award, the Court reiterated its rejection of a categorical approach and reaffirmed its statement in *Haslip* that:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.⁵⁷

Guidepost III: Sanctions for comparable misconduct. Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicator of excessiveness. The *BMW* Court stated that a reviewing court should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.⁵⁸ Although this guidepost was not adopted by the Court on the basis of historical acceptance and use, it does provide guidance when the punitive damage award is "substantially greater than the statutory fines

56. *Axen v. American Home Prods. Corp.*, 974 P.2d 224, 243 n.24 (Or. Ct. App. 1999).

57. *BMW*, 517 U.S. at 582-83.

58. *See id.* at 583.

available.”

In *BMW*, the Court found that the first guidepost (degree of reprehensibility) indicated that BMW’s infliction of harm was purely economic in effect and no particular malicious intent was involved. The second guidepost (ratio between harm and punitive damage awards) suggested that a ratio of five hundred times the compensatory award was clearly outside any acceptable range. The third guidepost (criminal and civil sanctions) focused on Alabama’s \$2,000 fine for similar action and noted the fine was substantially smaller than the \$2 million punitive damage award. Further, the lack of notice of any state law that the punishment would be so large dispelled any claim that BMW was an intentional recidivist with full knowledge of the size of potential punitive damage awards.

B. Commentary & Dissenting Opinions

Most comments following *BMW* have pointed out that the three guideposts—reprehensibility, ratio, and similar sanctions—provide little guidance to state courts in evaluating punitive damages.

The test falls short of providing a workable, progressive standard that may be readily adopted and applied by the lower courts. . . . [T]he application of the standard will consume tremendous judicial resources at both the trial and appellate levels.⁵⁹

[T]he Court’s analysis in [*BMW*] provides little guidance to either legislatures or lower courts regarding the contours of the constitutional limitations on excessive punitive damage awards. . . . Unfortunately, [*BMW*] does not complement the earlier line of cases; in fact, [*BMW*] obfuscates issues that the Court had seemingly settled previously. . . . [*BMW*’s] three “guideposts” provide little guidance for future due process review; as a result, such review will be almost entirely subjective.⁶⁰

The *BMW* Court accomplished little headway on the road to clarifying the standard by which courts may measure the constitutionality of a punitive damages award. . . . The result is uncertainty for future litigants, whose success hinges on the essentially subjective assessments of the reviewing court. . . . If there are clearly defined guidelines on the awarding of punitive damages, the awards of lower courts would more likely be sustained and needless litigation over the award amounts would be reduced . . . while the Court’s decision in *BMW* appears to

59. Sykes, *supra* note 5, at 1107, 1114.

60. *Civil Forfeiture—Innocent Owner Defense*, *supra* note 52, at 145, 151, 152.

mandate a more orderly system for assessing punitive awards, it falls short of establishing such a system itself.⁶¹

A definitive test remains obscure. Lower courts must choose from these conflicting standards in deciding how to objectively evaluate a punitive award for excessiveness.⁶²

BMW may seriously undermine state policies regarding the punitive awards process... Constitutional review of punitive damages could also mean that an award that complies with a state statutory maximum may still violate substantive due process.⁶³

The dissenting opinions in *BMW* undoubtedly increased the level of concern with their biting criticism of the majority's inability to set definitive criteria for assessing punitive damage awards. Although not a commentary in the usual sense, Justice Scalia's dissent in *BMW* stated that the Court's three guideposts "mark a road to nowhere [and] provide no real guidance at all."⁶⁴ Justice Scalia, in his usual direct manner, went on to state that the Court's framework "does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not fair."⁶⁵ Similarly, Justice Ginsburg's dissent noted that "[T]oo big is, in the end, the amount at which five Members of the Court bridle."⁶⁶

C. Concurring Opinion

The uncertainty over exactly how objective standards for the assessment of punitive damages may be drawn from the three guideposts of *BMW* gives renewed importance to the presumption of validity of the award that arises when fair procedures are followed. In fact, the entire point of the concurring opinion in *BMW* was to explain why the presumption of validity when using the *Green Oil/Haslip* factors did not apply in *BMW*. The extraordinary length to which the concurring opinion goes to explain why the *BMW* punitive damage award was not entitled to the presumption of validity (because the Alabama courts had interpreted the *Green*

61. Calcagni, *supra* note 52, at 731-32.

62. Register, *supra* note 52, at 1280.

63. Andrews, *supra* note 52 at 319.

64. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 517 U.S. 559, 587 (1996) (Scalia, J., dissenting).

65. *See id.* at 586-87 (Scalia, J., dissenting).

66. *See id.* at 592 (Ginsburg, J., dissenting).

Oil/Haslip factors in a way that “belied their purpose”) serves to reinforce the importance of following fair procedures for the assessment and review of punitive damages. Inherent in this emphasis is the reaffirmation of the *Haslip* and *Honda* principles regarding the importance of following fair procedures for the assessment and review of punitive damages.⁶⁷ Adherence to fair procedures, as those procedures are outlined in the *BMW* concurring opinion, would serve to keep the original award within reasonable limits, provide valuable criteria for a reviewing court, and enable the successful plaintiff to receive the substantial benefit of the presumption of validity when the punitive damage award is under federal due process scrutiny.⁶⁸ The degree to which the concurring opinion in *BMW* focuses on the importance of following fair procedures seems to suggest their discomfort with reviewing courts setting arbitrary levels that define excessive punitive damage awards.

It is against this background of seemingly arbitrary guideposts and sharp criticism that the concurring justices felt compelled to address their concern over the need to require the application of law, rather than a decisionmaker’s caprice. The justices felt that the application of law was necessary to give the requisite notice that a person’s actions may be subject to punishment and to assure the uniform treatment of similarly situated persons.

Justice Breyer begins the concurring opinion by explaining that if “fair procedures are followed, a judgment that is a product of that process is entitled to a strong presumption of validity.” The Court had also held in *Haslip* that procedures similar to those followed by the Alabama courts in *BMW* were not, by themselves, fundamentally unfair. However, in the present case, the presumption of validity was overcome by the manner in which “the Alabama courts interpreted those standards.”⁶⁹

Justice Breyer emphasized the importance of legal standards that provide “reasonable constraints” within which “discretion is exercised” that assure “meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.”⁷⁰ The concurring opinion held that Alabama’s legal

67. See *id.* at 587-88.

68. See *id.* at 590-92.

69. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 592 (1996) (Breyer, J., concurring).

70. *Id.* at 587.

process failed to provide the necessary constraint on the jury and the courts in five areas. First, the Alabama statute allowing for punitive damages gave no guidance regarding the size of the punitive damages appropriate for different types of conduct. Second, the Alabama Supreme Court applied the *Green Oil/Haslip* factors in a way that imposed little actual constraint. Third, the Alabama courts made no use of an alternative standard or theory for the award, such as some economic justification, that would provide the constraining legal force that might otherwise be absent due to Alabama's broad punitive damage statute or ineffective application of the *Green Oil/Haslip* factors. Fourth, the award did not conform to any community understanding or historic practice that would provide background standards that constrained arbitrary behavior and excessive awards. Fifth, no legislative enactment classified or quantitatively limited punitive damage awards that would constrain otherwise unbounded discretion.

Justice Breyer ultimately concluded that the system of standards did not significantly constrain the jury and the Court's discretion. In light of the state's legitimate punitive damage objectives, the defective system of standards combined with the grossly excessive amount of the award overcame the strong presumption of validity generally accorded such decisions.

IV. ASSESSING BMW'S IMPACT

A. Due Process

It has been argued that the primary difficulty with *BMW* is the Court's attempt to apply substantive due process to what is essentially a subjective process of awarding punitive damages.⁷¹ Justice Scalia clearly recognized this concern in his dissent, when he noted the great difficulty of using the Due Process Clause to measure the "fairness" of a punitive damage award.

There is general agreement among the legal community that the realities of law require appellate courts to give great deference to findings of fact by juries. Given that different conclusions will be drawn from similar fact situations,⁷² the Due

71. See Jim Davis, Note, *BMW v. Gore: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 U. KAN. L. REV. 395 (1998).

72. See *id.* (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING*

Process Clause can only require state courts to conduct meaningful review; there cannot be a federal guarantee that all punitive damage awards will be reasonable and fair to everyone. Every case presents a unique fact situation and even similar cases have subtle differences that the fact-finder is most qualified to consider and weigh when assessing a punitive damage award. Fact-specific punitive damage awards are not readily susceptible to a formula-based standard.⁷³ Likewise, it is nearly impossible to set a "bright line" limit on the ratio of punitive to compensatory awards. The considerable confusion resulting from the ratio of 4 to 1 in *Haslip* being "close to the line," but the ratio of 526 to 1 in *TXO* being constitutional, laid the groundwork for the Court's struggle to define guideposts in *BMW*. It seems apparent that there is considerable merit to the suggestion that tort law is an area traditionally and rightly left to the states;⁷⁴ what federal substantive law can and should do is focus on procedural due process.

In *Honda Motor Co. v. Oberg*, the Court emphasized the integrity of the judicial review process as a powerful safeguard that protects against excessive punitive damage awards. In the earlier *Haslip* decision, the Court clearly engaged in a procedural inquiry while the Court in *TXO* was careful to distinguish between the procedural and substantive challenges.⁷⁵ The difficulty presented by *BMW* is that the Court must be seen to have made a *substantive* due process decision. To view the decision otherwise would overrule the clear endorsement of Alabama's procedures in *Haslip*. To further blur the distinction between substantive and procedural due process, the *BMW* Court framed its decision in terms of notice to the defendant, a procedural concept. The Court then set forth three substantive guideposts that look at the amount awarded.

Although the *BMW* Court left intact the *Green Oil/Haslip*

APPEALS 24 (1960); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN L. REV. 1, 14 n.50 (1991)).

73. See Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 12 (1992).

74. See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (stating that creating a federal common-law formula to determine when a punitive damage award is excessive would require the Court "to ignore the distinction between the state-law and federal-law issues."). The Court declined the invitation to infringe upon state law by creating such a federal common-law standard.

75. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (plurality opinion) (making a substantive due process determination in Parts II and III and dismissing TXO's procedural arguments in Part IV).

standards for use by the Alabama Supreme Court upon remand, to be used when reconsidering the *BMW* punitive damage award, there was now a substantive constitutional requirement on lower courts to actually *exercise these processes properly*. What may be gleaned from *BMW* is the need for lower courts to be aware that federal appellate review will not tolerate mere lip service to substantive standards during review by the trial and appellate courts. Justice O'Connor, concerned that just such lip service had occurred in *TXO*, quoted from the West Virginia Supreme Court of Appeals:

We understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences.⁷⁶

The burden that *BMW* has placed on trial judges is great—judges must clearly articulate what standards to use to assess and review punitive damage awards and truly apply those standards in a manner that does not belie their purpose.

B. *BMW's "Shadow" on Settlement Practices*

Approximately 97% of all cases settle out of court,⁷⁷ which necessitates consideration of the effect of the *BMW* decision on the settlement process. Much of the academic debate concerns the "shadow effect"⁷⁸ of *BMW* on settlement practices.⁷⁹ Defendants are concerned that cases will be difficult to resolve because the unpredictability of punitive damage awards will not let cases settle at their true value.⁸⁰ One of the major benefits that is hoped will result from *BMW* is the removal of the "jackpot" mentality surrounding punitive damage awards and

76. *Id.* at 500 (O'Connor, J., dissenting) (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 907 (W. Va. 1991)).

77. See Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 209.

78. This term is commonly used to acknowledge that the parties are negotiating in the "shadow" of the legal system. Verdict reports are used to assist negotiating parties calculate expected low and high limits of judgment exposure.

79. See Koenig, *supra* note 77, at 180. Lawsuits represent only a small portion of total liability claims, however. Only 2 percent of such claims are settled by verdict and only one-third of claims become lawsuits. Nevertheless, lawsuit verdicts are important because they influence the damage amount sought by plaintiffs and the size of out-of-court settlements. See Ruth Gastel, *The Liability System*, INS. INFO. INST. REP. 1 (1998).

80. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1137 (1996).

the corresponding return of a level of predictability to the settlement process. By requiring a due process standard that prohibits "grossly excessive" punitive damage awards, negotiators will be able to enter into the settlement process with the knowledge that punitive damages may be awarded. Those damages may be large, but they will not be "grossly excessive."⁸¹ Counsel attempting to place a high and low limit on punitive damage exposure must be aware of what evidence will be presented to the jury, what instructions will be given to the jury, and what factors the trial and appellate courts will consider when reviewing the jury award. Counsel should also be aware, when factoring actual jury awards of punitive damages into their settlement offers, of the jurisdiction and time of the award. Awards that pre-date *BMW*, or were not subject to *BMW* guidepost scrutiny by a reviewing court, are substantially diminished as indicators of what can be considered substantially reasonable.

C. *BMW in the Courts*

Within a year after the *BMW* decision, its impact was felt throughout the United States, albeit not in Alabama to any significant degree.⁸² The most significant impact is the divergence between state and federal courts' applications of the *BMW* guideposts. Federal courts are more likely than state courts to reduce a punitive damage award.⁸³ Federal courts seem to draw a constitutional line at a punitive to actual damage ratio of 5 to 1 while state courts allow awards as high as

81. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 n.31 (7th Cir. 1997) (noting that with respect to punitive damages, the "judicial pendulum may be swinging back toward a more cautious approach. . .").

82. The results of the *BMW* decision in Alabama have been minimal; Alabama is often referred to as "a tort hell." Richard Thornburgh, *Want to Win a Big Suit? Go to Alabama*, USA TODAY, June 27, 1996, at 13A. From 1990 to 1994 juries in Alabama awarded punitive damages nearly 10 times more often than the average jury in the U.S. Jacqueline Bueno, *Punitive-Damage System Needs Fixing-But How?*, WALL ST. J., Oct. 18, 1995, at S1. Between 1987 and 1993, punitive damage awards in Alabama totaled over \$101 million while such awards in neighboring states of Georgia, Tennessee, and Mississippi were slightly over \$7 million, \$5 million, and \$3 million respectively. It is not surprising that Wal-Mart was recently ordered by an Alabama jury to pay \$3 million in punitive damages for the false arrest of a suspected shoplifter. See ASSOCIATED PRESS, Feb. 17, 1999.

83. See Samuel A. Thumma, *In the Year Since the High Court's Landmark Decision in 'BMW,' Federal Courts Have Reduced Punitive Damages Awards More Frequently Than Have State Courts*, NAT'L L.J., June 30, 1997.

30 to 1.⁸⁴ The Tenth Circuit interpreted *BMW* to impose a maximum ratio of 10 to 1 for economic injury cases where the damage is significant and easily detected.⁸⁵ The South Dakota Supreme Court has upheld a punitive damage award ratio of 30 to 1 after applying South Dakota's five-part test and additional considerations as required by *BMW*.⁸⁶ The varied interpretations of *BMW* that have occurred since the *BMW* decision suggest that Scalia's dissenting concern—the three guideposts “provide no real guidance at all”—was indeed prophetic.

V. STATE STANDARDS AND APPELLATE REVIEW PROCEDURE

Separate and apart from the *BMW* guideposts, most states have their own standards for assessing punitive damages. State standards may be developed from case law⁸⁷ or specifically spelled out by statute.⁸⁸ In some jurisdictions, the court may take into account the size of awards in similar cases⁸⁹ but this is a perplexing issue when the jury is not allowed to consider such awards when the jury sets the level of punitive damages.

Although many state standards are nearly identical to the *BMW* guideposts, these state standards may be subsumed into the *BMW* criteria.⁹⁰ Thus, when liability is based on state law judges must assess and review a punitive damage award under

84. See *id.*

85. See *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996).

86. See *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996).

87. See *Ford Motor Co. v. Sperau*, 708 So.2d. 111 (Ala. 1997). The Alabama Supreme Court noted that the first two guideposts of *BMW* were already encompassed within state factors, developed earlier by Alabama case law.

88. See, e.g., KAN. STAT. ANN. § 60-3701(b) (1996), specifying that a court may consider the following factors in determining whether the amount of punitive damages awarded is reasonable:

- (1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
- (2) The degree of the defendant's awareness of that likelihood;
- (3) The profitability of the defendant's misconduct;
- (4) The duration of the misconduct and any intentional concealment of it;
- (5) The attitude and conduct of the defendant upon discovery of the misconduct;
- (6) The financial condition of the defendant; and
- (7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct.

89. See *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993).

90. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 934 (M.D.N.C. 1997) (“[T]he North Carolina considerations [regarding whether a punitive award is excessive] as well as a majority of the South Carolina factors are included in the three *BMW* guideposts.”).

both the *BMW* and state standards.⁹¹ While some courts have developed a unitary analysis,⁹² most courts conduct a two-step analysis, separately considering the award under state standards and federal constitutional requirements.⁹³ The separate analyses are preferable because even though a punitive damage award may meet the *BMW* guideposts, it may still violate state standards, and vice versa.⁹⁴

VI. PROCEDURAL DUE PROCESS REQUIREMENTS

Haslip has been interpreted as establishing three due process requirements to protect the defendant:

1. At trial, the jury must have adequate guidance by instructions, so that its award is reasonable, and not a product of "unlimited jury discretion."
2. The state must establish post-trial procedures for trial court review of punitive damage awards to ensure "meaningful and adequate review by the trial court."
3. The state must establish post-trial appellate review procedures . . . [to make] "certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."⁹⁵

A. Jury Instructions

Jurors often receive only general instruction regarding the factors to consider when assessing the amount of punitive damage awards. Courts frequently instruct the jury to fix the punitive damage award at a level that will punish and deter, after consideration of the defendant's conduct, the nature and extent of the plaintiff's injury, and the defendant's wealth.⁹⁶

91. See *FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) ([W]hether a "punitive damage award violates the Federal Constitution is a question separate and apart from Oklahoma state law."). When liability is based solely on federal law, only *BMW* factors apply. See *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997) (action for employment discrimination under 42 U.S.C. § 1981).

92. See *Parsons v. First Investors Corp.*, 122 F.3d 525 (8th Cir. 1997).

93. See *Cates Constr., Inc. v. Talbot Partners*, 62 Cal. Rptr. 2d 548 (Cal. Ct. App. 1997).

94. See *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241 (9th Cir. 1998).

95. *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1110 (Or. 1993) (Peterson, J., dissenting), *rev'd*, 512 U.S. 415 (1994).

96. See Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 163 (1991).

The concern about nonspecific jury instructions appeared to be a primary focus of Justice O'Connor's dissent in *TXO* when she noted that "[a]rbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decision-making."⁹⁷ Justice O'Connor was concerned that these influences would shape a jury's decision in the context of punitive damages when "juries sometimes receive only vague and amorphous guidance."⁹⁸

The Wyoming Supreme Court expressed just this concern when it recently reviewed Wyoming's punitive damage procedure in light of the *BMW* guideposts.⁹⁹ After noting that the United States Supreme Court's history with the punitive damage issue was "somewhat tortured," the Wyoming court said the change in emphasis contained in *BMW* permitted Justice O'Connor to shift from her previous dissenting positions and join the majority and concurring opinions of *BMW*.¹⁰⁰

The Wyoming court found the standards of review used by the Wyoming courts totally subjective because the court had the authority to set aside or reduce an award of punitive damages on an ad hoc basis when the amount of the award shocked the collective judicial conscience of the court. The basic premise of Wyoming law had been that the amount of punitive damages was largely in the discretion of the finder of fact.¹⁰¹ Recognizing *BMW* demands that a court articulate objective standards, which can be communicated to the jury in the form of instructions and against which the propriety of the punitive damage award could be weighed during the process of judicial review, the Wyoming court wisely required the jury to be instructed on the objective criteria for awarding punitive damages required by federal substantive due process. To not so instruct the jury would "hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from application of our current process."¹⁰²

Similarly, the Model Punitive Damages Act (MPDA) suggests that the jury be instructed on the factors to be properly

97. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting).

98. *Id.*

99. *See Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040 (Wyo. 1998).

100. *Id.* at 1043.

101. *See id.* at 1045.

102. *Id.*

considered in assessing punitive damages.¹⁰³ The nine factors suggested by the MPDA are described in the Comments to the MPDA as “relatively non-controversial.” The MPDA suggestions incorporate the *BMW* guideposts. If the trial judge is the fact-finder, the MPDA recommends that the judge make findings showing the basis for an award of punitive damages.¹⁰⁴

It is clear that the *Haslip/TXO/Honda/BMW* line of cases require that the *Green Oil/Haslip* factors, *BMW* guideposts, similar state standards, or a combination of comparable detailed criteria that provide “reasonable constraints” on punitive damage awards, be used to determine the level of punitive damages.

A jury instruction that provides a strong measure of meaningful constraint and limits the “[u]nlimited jury discretion” that was a concern in *Haslip* and *BMW* will be the first of two steps that ensure a punitive damage award is not arbitrary and complies with substantive due process.

B. Judicial Review

Although the second and third *Green Oil/Haslip* factors mandate separate trial and appellate review, some states do not

103. See MODEL PUNITIVE DAMAGES ACT § 7, 14 U.L.A. 56 (Supp. 1997). The jury is instructed to consider any evidence that has been admitted regarding the following factors:

- (1) the nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) the amount of compensatory damages;
- (3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (4) the defendant's present and future financial condition and the effect of an award on each condition;
- (5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
- (6) any adverse effect of the award on innocent persons;
- (7) any remedial measures taken or not taken by the defendant since the wrongful conduct;
- (8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and
- (9) any other aggravating or mitigating factors relevant to the amount of the award.

104. See MONT. CODE ANN. § 27-1-221 (1997) (requiring the trial judge, when acting as a fact finder, to make findings of fact on each of the statutory factors when making a punitive award). See also Section VII, *infra*.

distinguish between trial court and appellate court review.¹⁰⁵ This distinction is important because of the unique opportunity of the trial judge to view the witnesses' credibility and weigh the proof.¹⁰⁶ Separate from any motions for judgment notwithstanding the verdict and motions for a new trial, some states require that the trial judge automatically review the punitive damage award for excessiveness, or for excessiveness and inadequacy. Florida¹⁰⁷ and Montana¹⁰⁸ require such a review by the trial judge.

When the trial court reviews an award of punitive damages, or when a motion for a new trial includes the claim that the punitive damage award is excessive, the judge will be required to consider a variety of factors. Foremost among the factors is whether the verdict is the result of passion, prejudice or improper influence that shocks the conscience of the court.¹⁰⁹ The primary inquiry is whether the verdict was against the great weight of the evidence. When a punitive damage award is challenged on the basis that it is so excessive that it violates due process considerations, the court must apply a *BMW* guidepost review.

One of the issues raised in *BMW* was a state court's erroneous belief that by stating it "considered the *Green Oil/Haslip* factors, or similar state standard," the court could "bullet proof" a punitive damage award and conclusively establish the definite and meaningful constraint on the fact finder's discretion in awarding punitive damages. The Alabama court took this position in *BMW*; despite consideration of the *Haslip/Green Oil* factors the Alabama court's decision was reversed.

As the concurring opinion pointed out in *BMW*, the state court's application of the factors intended to constrain punitive damage awards will lead to reversal if done "in a way that belies that purpose."¹¹⁰ As the first judicial authority to review the punitive damage award, the trial judge is under a substantial

105. See, e.g., *Clay v. Ferrellgas, Inc.*, 838 P.2d 487, 492 (N.M. Ct. App. 1992), *rev'd on other grounds*, 881 P.2d 11 (N.M. 1994), *cert. denied*, 513 U.S. 1151 (1995).

106. See, e.g., *Crookston v. Fire Ins. Exch.*, 817 P.2d. 789, 804 (Utah 1991) ("[T]he trial judge is present during all aspects of the trial and listens to and views all witnesses. Therefore, he or she can best determine if the jury acted with 'passion or prejudice' and whether the award was too small or too large in light of the evidence.").

107. See FLA. STAT. ANN. § 768.74(1) (West 1997).

108. See MONT. CODE ANN. § 27-1-221(7)(c) (1997).

109. See, e.g., *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 466 (Idaho 1996).

110. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 589 (1996).

duty to conduct a meaningful review that does not rely on mere formal recitation of the statutory criteria or abdicate the duty of independent review by slavishly adhering to jury conclusions about the proper level of punitive damages.

The usual review procedure requires the trial judge to first determine if the punitive damage award bears a reasonable relationship to the goals of punishment and deterrence. Thereafter, the trial judge must determine whether the sum awarded is within proper bounds.¹¹¹ It is critical for the trial judge to articulate the reasons for modifying or confirming the jury verdict, providing the appellate court with a reflective second look at the trial evidence. The unique opportunity of the trial judge to view witness credibility and weigh the proof gives substantial weight to the trial judge's review.

When the appellate court considers a challenge to a punitive damage award on the basis of excessiveness, its analysis should also consider the award under both state standards and constitutional standards as articulated in *BMW*. If the appellate court determines that the award is excessive, it may vacate the award and remand for a new trial on the issue of damages only or modify the award without remanding for a new trial.¹¹²

VII. PUNITIVE DAMAGES IN MONTANA

A. Statutory Procedure

Montana substantially rewrote its punitive damage law, both procedurally and substantively, in 1987. Montana requires a bifurcated trial. Compensatory damages and liability for punitive damages are determined separately. At the compensatory damage phase, the court does not instruct the jury on the appropriate level of punitive damages. After the jury returns a verdict that the defendant is liable for punitive damages, an immediate separate proceeding commences and the same jury hears evidence relevant to the level of punitive damages. At the punitive damage phase, the statute's only requirement is that the jury consider the defendant's financial

111. The analysis may be made in a two step process or the two steps may be combined into a unitary review. See, e.g., *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991).

112. See *Cates Constr., Inc. v. Talbot Partners*, 62 Cal. Rptr. 2d 548 (Cal. Ct. App. 1997).

affairs, financial condition, and net worth.¹¹³

B. Statutory Criteria for Trial Court Review of Punitive Damage Award

Although the Montana statute does not require that the jury be instructed on the statutory criteria, the trial judge's review of the jury award of punitive damages must demonstrate consideration of each of the following criteria:

- (1) The nature and reprehensibility of the defendant's wrongdoing;
- (2) The extent of the defendant's wrongdoing;
- (3) The intent of the defendant in committing the wrong;
- (4) The profitability of the defendant's wrongdoing, if applicable;
- (5) The amount of actual damages awarded by the jury;
- (6) The defendant's net worth;
- (7) Previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
- (8) Potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
- (9) Any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.¹¹⁴

C. Instructions

Montana's punitive damage cases decided after *BMW* do not reveal what instructions were given the juries to assist in assessing the amount of the punitive damage award. Local practice suggests using the Montana Pattern Jury Instruction (MPJI) on punitive damages developed by the Montana Supreme Court Commission on Civil Jury Instructions. MPJI 25.65 is customarily given to assist the jury in determining the amount of punitive damages. MPJI 25.65 reads as follows:

In determining the amount of punitive damages, you should consider all of the attending circumstances, including the nature, extent and enormity of the wrong, the intent of the party committing it, the amount allowed as actual damages and, generally, all of the circumstances which may operate to reduce

113. See MONT. CODE ANN. § 27-1-221(7)(a) (1997).

114. See *id.* § 27-1-221(7)(b).

without wholly defeating punitive damages.

Punitive damages should be of such an amount as will deter the defendant from, and warn others against similar acts of misconduct. Thus, the wealth of the defendant is a fact to be considered by you in determining the amount of punitive damages.¹¹⁵

MPJI 25.65 falls short of providing much helpful, and required, guidance for the assessment of punitive damages. It does not:

- (1) Expressly limit the jury to consideration of the defendant's in-state actions, an express due process limitation,¹¹⁶
- (2) Advise the jury to consider the profitability of the defendant's wrongdoing, although this is a specific statutory factor required by Montana Code Annotated § 27-1-221,
- (3) Distinguish between the defendant's "wealth" and the statutory criteria requiring consideration of the defendant's "new worth",¹¹⁷
- (4) Advise the jury to consider many of the *Haslip/Green Oil* "definite and meaningful constraint" criteria—the harm likely to occur as well as the harm that actually occurred, the defendant's awareness of the wrongful nature of the act, the defendant's concealment of the wrongful act, the existence and frequency of similar past conduct, the desirability of removing the defendant's profit from the wrongful conduct and also the desirability of having the defendant sustain a loss, the cost of litigation, the imposition of criminal or civil sanctions against the

115. Montana Pattern Jury Instruction 25.65.

116. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

117. The difference between "new worth," a technical accounting term generally computed as the amount by which assets exceed liabilities, and "wealth," a general concept which includes possessions, assets, and all material objects having a value, has the potential to create the argument that consideration of the defendant's "wealth" exceeds the statutory standard of "net worth." See BLACK'S LAW DICTIONARY 1041, 1593 (6th ed. 1990).

defendant and the existence of other civil awards against the defendant for the same conduct (both the sanctions and civil awards to be taken in mitigation).

D. Judicial Review

Montana provides by statute that after the jury has determined the amount of punitive damages, the trial judge must automatically review the punitive damage award based on specified statutory criteria. Following that review, the trial judge may increase, decrease, or affirm the jury's verdict. In reviewing the punitive damage award, the district judge has broad discretion but that discretion is not unlimited. The decision of the trial judge to increase, decrease, or affirm the jury verdict must be supported by a clear statement of the reasons for taking such action. The statement of reasons shall be in the form of findings of fact and conclusions of law, and shall demonstrate consideration of each of the nine factors defined by statute. If the trial judge decides to increase or decrease the jury verdict his or her decision must be supported by the statutory criteria and by findings of fact which are themselves supported by substantial evidence and not inconsistent with findings implicit in the jury's verdict.¹¹⁸ The judge is bound by the jury's determination of facts on all issues that have been presented to the jury. The review by the trial court does not open the door for reversal of jury findings on underlying issues of liability.¹¹⁹

If a punitive damage award is appealed, the Montana Supreme Court reviews the district court's findings regarding the amount awarded. The court uses a three-part test to determine if the district court findings are clearly erroneous. First, the court reviews the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the court determines if the trial court misapprehended the effect of the evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the court may still determine that a finding is clearly erroneous when, although evidence supports the finding, review of the record leaves the court with the

118. See *DeBruycker v. Guarantee Nat'l Ins. Co.*, 266 Mont. 294, 300, 880 P.2d 819, 822 (1994).

119. See *id.* at 300, 880 P.2d at 822.

definite and firm conviction that a mistake has been made.¹²⁰

In conducting its review of the trial judge's findings, the court has not set a specific level of detail needed to demonstrate consideration of the statutory criteria. Awards have been affirmed by a statement that since "[t]he district court considered the factors in 27-1-221(7)(b), MCA, and concluded that . . . was an appropriate amount for punitive damages . . . we will not disturb their decision."¹²¹ At the other end of the spectrum, the court has detailed the extensive findings made by the trial court and thereafter concluded that, with the exception of one finding not supported by the evidence, the remaining findings were supported by substantial, credible evidence and not clearly erroneous.¹²² The court has also held that the trial court's function is not to simply engage in a mathematical calculation to determine whether the majority of factors favor one disposition or the other. Under any given set of circumstances, one factor may be weighted more heavily than others. For example, when a defendant's net worth has been established and simply precludes a substantial damage award, that factor may merit primary consideration. In such circumstances, the district judge must articulate why one factor weighs more heavily than others to support altering the jury's punitive damage award.¹²³

Nineteen months after *BMW* was decided, the Montana Supreme Court was presented with an excellent opportunity to consider the *BMW* guideposts and how they might impact Montana's statutory criteria for reviewing punitive damages.¹²⁴ Unfortunately, the Montana Supreme Court declined to apply either the *BMW* guideposts or acknowledge the existence of a U.S. Supreme Court decision making the level of a punitive damage award an issue of federal substantive law.

E. Montana's Neighboring States

Montana's neighboring states have all incorporated the *BMW* guideposts in recent decisions. With the exception of

120. See *Interstate Prod. Credit Ass'n v. DeSaye*, 250 Mont. 320, 322, 820 P.2d 1285, 1286 (1991).

121. *Rocky Mountain Enters., Inc. v. Pierce Flooring*, 286 Mont. 282, 296, 951 P.2d 1326, 1335 (1997).

122. See *Cartwright v. Equitable Life Assurance*, 276 Mont. 1, 43, 914 P.2d 976, 1002 (1996).

123. See *id.* at 44, 914 P.2d at 1002.

124. See *Rocky Mountain Enters., Inc.*, at 287, 951 P.2d at 1329.

Wyoming, it appears that the *BMW* guideposts have not caused significant modifications of existing punitive damage criteria. North Dakota made only a passing reference to the *BMW* holding when ruling that the sum awarded did not violate the *BMW* prohibition against a punitive damage award based on conduct lawful in another jurisdiction.¹²⁵ Shortly after the *BMW* decision, the South Dakota Supreme Court held that excessive punitive damages are now firmly held to carry constitutional implications.¹²⁶ The South Dakota court has skillfully integrated several of the *BMW* guideposts into the five criteria that South Dakota uses to assess the reasonableness of a punitive award. Idaho, in a case decided just after *BMW*, recognized its notice requirements and the absence of a fixed upper limit on the ratio of compensatory to punitive damages.¹²⁷ The Idaho court deferred to the trial judge's ruling that articulated a sound basis for the punitive damage award and held that no constitutional limitation had been violated.

The Wyoming Supreme Court took a hard look at its punitive damages procedure and found it lacking.¹²⁸ Although finding that Wyoming precedent fits with the three guideposts of *BMW*, the court concluded that the instructions given to the jury were inadequate and should have included more specificity in accord with those adopted in *BMW* from *Haslip*. The Wyoming court held that the jury should be instructed on all seven of the *Green Oil/Haslip* factors and that failure to do so justified remand for a new trial.

VIII. TRIAL JUDGE'S PUNITIVE DAMAGE/DUE PROCESS DUTIES

The fractured decision of *BMW* makes it difficult to predict future federal due process requirements. What does seem clear, from the *BMW* concurring opinion, academic commentary, and subsequent lower court decisions, is that the next due process requirement likely to be required by the Supreme Court will be a jury instruction on factors that promote "reasonable constraints" and judicial review which is comprehensive and the product of the exercise of the judge's independent judicial discretion. As the Supreme Court stated in *TXO*, and reiterated

125. See *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273, 286 (N.D. 1997).

126. See *Grynberg v. Citation Oil & Gas*, 573 N.W.2d 493 (S.D. 1997); *Veeder v. Kennedy*, 589 N.W.2d 610 (S.D. 1999).

127. See *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996).

128. See *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040 (Wyo. 1998).

in *BMW's* concurring opinion, if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."¹²⁹

The trial judge owes a duty to the parties and their counsel to provide fair and competent trial leadership that ensures the punitive damage award is appropriate to the circumstances of the case. Possessing a familiarity with the due process history of punitive damages, and armed with the *Green Oil/Haslip* factors, *BMW's* guideposts, Model Punitive Damage Act suggestions, and state standards, the trial judge will be well equipped to properly instruct the jury and conduct the trial court review of the jury award of punitive damages.

A. Instructions

Long before the jury decides that punitive damages should be awarded, the trial judge must begin planning to instruct the jury on its task of setting the level of punitive damages.¹³⁰ Comprehensive jury instructions can guide the judge's rulings on objections to damage evidence and diminish challenges to the trial judge's review of the punitive damage award.

When jury instructions omit statutory or due process criteria, several problems present themselves to the trial judge. In the absence of explicit criteria, the trial judge must decide what evidence will be presented to the jury for their consideration in setting the level of punitive damages. Generally, the instructions will set the parameters for the admission of evidence but when the instructions do not include all of the statutory criteria, argument inevitably arises over whether the jury should hear evidence not covered in the instructions. An instruction that contains all of the relevant statutory criteria, not unduly prejudicial, clearly informs the trial judge and counsel of the limits on the admission of punitive damage evidence.

129. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586-87 (1996).

130. Discovery requests for the defendant's financial information will generally be the first damage related issues presented to the trial judge. See *FULL DISCOVERY: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES* app. 1 (2d ed. 1995). See also *Delgado v. Kitzman*, (Tex. Ct. App. 1990), 793 S.W.2d 332 (allowing discovery of defendant's net worth); *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977) (holding where punitive damages are claimed, defendant's financial condition is proper subject of discovery); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (finding information concerning defendant's financial condition relevant and discoverable on a claim of punitive damages).

The trial judge must be aware that if the instructions tell the jury to consider certain evidence, but fail to mention other evidence presented to the jury, this omission raises the issue that the instructions unduly emphasized certain aspects of the evidence and are a prohibited judicial comment on the evidence. An instruction that briefly mentions all of the factors that may be properly considered by the jury would cure this potential problem.

It can be argued that catch-all criteria, such as Montana's "any other circumstances. . .," would allow consideration of evidence not specifically enumerated in a criteria-based instruction.¹³¹ The problem with that approach is that it causes exactly the problem presented in *Dees*, where the plaintiff wanted to prove cost of litigation (a *Green Oil/Haslip* factor) to show intent, malice and bullying by American National of its insured. The Montana Supreme Court said such proof was not required under Montana's statutory criteria and anyway, the jury is permitted to hear any other evidence under the "any other circumstances" criteria. Unfortunately for the plaintiff, the trial judge had not allowed evidence on the cost of litigation so this factor was not considered by the jury or the trial judge.

In her dissent in *Haslip*, Justice O'Connor was adamant that the *Green Oil/Haslip* factors "could assist juries to make fair, rational decisions."¹³² Justice Scalia, in his dissent in *BMW*, made the telling point that, although he disagreed with the majority position that each assessment of punitive damages must be examined to determine the precise "state interest," if those interests are "the most fundamental determinant of an award, one would think that due process would require the assessing jury to be instructed about them."¹³³

Given the problems associated with not fully instructing the jury on the statutory criteria for awarding and assessing punitive damages, it is valuable to examine just why the Wyoming Supreme Court, in its analysis of *BMW*, felt it necessary to conclude that:

The [U.S. Supreme] court not only has articulated a demand for objective standards as distinguished from subjective standards for awarding punitive damages, but it has signaled a future requirement that for due process to be present those objective

131. See *Dees v. American Nat'l Fire Ins. Co.*, 260 Mont. 431, 449, 861 P.2d 141, 152 (1993).

132. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 51 (1991).

133. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 602 (1996).

standards should be given to the jury in the form of instructions. If the objective standards are not communicated to the jury, then the invocation of such standards only for the purposes of review would infringe upon the right of the parties to a jury trial.¹³⁴

With the caveat that the judge must withhold certain evidence from jury consideration due to its extremely prejudicial effect (such as information about punitive to compensatory ratios), this author recommends that the trial judge invite counsel to propose jury instructions that give complete consideration of the *Green Oil/Haslip* factors, *BMW* guideposts, Model Punitive Damages Act suggestions, and state standards. Proposed jury instructions that fairly address substantive due process issues, if received in advance of the damage portion of the trial, guide the trial judge in ruling on the admissibility of evidence.¹³⁵ Included in this article as Appendix A is a summary of the *Green Oil/Haslip* factors, *BMW* guideposts, and Model Punitive Damages Act suggestions. Appendix A will be of assistance in reviewing proposed punitive damage instructions.

When settling punitive damage instructions, the judge may begin with state standards, incorporate the *Green Oil/Haslip* factors not included in the state standards, and conclude with any suggestions contained in the Model Punitive Damages Act (MPDA) that may bear on the fact situation. For example, the MPDA suggests consideration of the adverse effect of the award on innocent persons or any remedial measures taken or not taken since the wrongful conduct.¹³⁶ If warranted by the facts of the case, the MPDA suggestions can be valuable constraints on jury awards.

In light of the shortcomings of Montana Pattern Jury Instruction 25.65 noted above, this author suggests that the revised instruction included as Appendix B would encompass all of the statutory criteria to be considered by the trial judge in

134. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1043-44 (Wyo. 1998).

135. See FED. R. CIV. P. 51. Many state rules of civil procedure are modeled after the federal rule, which provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

See also MONT. R. CIV. P. 51, providing that "the court may, during the trial or at the close of the evidence, request each of the parties to submit proposed written instructions on the law of the case."

136. See *BMW*, 517 U.S. at 565-66 (noting that before the judgment against BMW in Alabama, BMW changed its policy regarding the sale of refinished vehicles in Alabama and two other states).

reviewing the punitive damage award, as well as the *Green Oil/Haslip* factors, *BMW* guideposts, and MPDA suggestions. Those portions of the instruction not raised by the evidence should be deleted.

B. Trial Court Review of Punitive Damage Awards

The trial judge's findings need to be detailed and comprehensive; they need to reflect any special circumstance that may not be apparent from the record. The detail needed in the trial judge's findings is well illustrated in *Parsons v. First Investors Corp.*¹³⁷ While applying Missouri's factors, the trial judge found that the Parsons were "an elderly retired couple of good standing in the community, but with limited education and investment experience. The defendant was experienced in selling financial investments." Further, the trial court found that First Investors "intended to take advantage of unsophisticated investors." The trial court concluded that "[f]raudulent representations which put the life savings of the elderly at risk are reprehensible and deserve punishment."

Findings that show the appellate court what the record does not reveal can be very persuasive and enable the appellate court to have confidence that the trial judge's review merits approval:

The reasonableness of the verdict was challenged before the trial judge and he reduced it. The fact he heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives him, we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on an observation of the [witnesses] and evaluation of their testimony.¹³⁸

The reviewing trial judge should make findings on each of the factors upon which the jury received instruction. The reviewing trial judge should recall that the jury has not been instructed on all of the factors and criteria that must be considered by the reviewing court. For example, the five-part hierarchy of reprehensibility from *BMW* Guidepost I and ratios from similar and dissimilar cases may not have been presented to the jury. When evaluating punitive damages, a trial judge would be well advised to begin with detailed findings on each state standard and then address federal due process

137. 122 F.3d 525 (8th Cir. 1997).

138. *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S. C. 1991).

considerations. When the judge evaluates a punitive damage award in accordance with state standards, in most cases the *BMW* guideposts will be fully addressed. For example, consideration of South Carolina's first criteria (defendant's degree of culpability) has been found to fully address the *BMW* guidepost of degree of reprehensibility.¹³⁹

Also of considerable value to the trial judge reviewing the punitive damage award is articulate consideration of the hierarchy of reprehensibility discussed in *BMW* Guidepost I. The Court specifically mentioned the "more reprehensible/less reprehensible" comparison of:

- (1) violent vs. nonviolent,
- (2) intentional trickery and deceit vs. negligence,
- (3) physical harm vs. economic harm,
- (4) repeated acts knowing it was unlawful vs. one instance of malfeasance, and
- (5) deliberate false statement vs. omission of material fact.¹⁴⁰

In addition, the Court noted that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty."¹⁴¹

When the trial judge considers *BMW* Guidepost II—ratio of punitive damages to compensatory damages—it is helpful for the trial judge to develop a field of reference to punitive damage awards in similar cases so the punitive award in the instant case is not considered in a vacuum. *BMW* reiterated that the constitutional line is not marked by a simple mathematical formula or bright line. However, a range of ratios has developed after *BMW*; federal courts set the permissible ratio at 5 to 1 and state courts set the ratio as high as 30 to 1.¹⁴²

The trial judge considering punitive to compensatory ratios needs to be aware that reported cases may not reflect the universe of punitive damage awards. A study was conducted in mid-1997 to determine how courts have handled punitive damages after the *BMW* decision.¹⁴³ The study analyzed both

139. See *Lister v. NationsBank*, 494 S.E.2d 449, 458 (S. C. 1997).

140. See *BMW*, 517 U.S. at 575-79.

141. See *BMW*, 517 U.S. at 576.

142. See Thumma, *supra* note 83.

143. See Theodore Eisenberg & Martin T. Wells, *Punitive Awards After BMW, a New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387.

state and federal court decisions. The authors concluded that the reported cases were systemically biased upwards when compared to the larger number of cases reported in the Civil Trial Court Network (CTCN) reporting system for state courts from forty-five of the country's largest urban counties. The authors determined that:

[A]n observer who sees only reported opinions will therefore have a different impression of the pattern of punitive awards than an omniscient observer.¹⁴⁴

The difference between the mass of cases decided in state trial courts and the highly filtered set of cases that lead to reported opinions has important implications for judicial review of the ratio of punitive to compensatory awards, either pre- or post-*BMW*. Courts reviewing punitive awards often try to assess such awards by comparing them with prior decisions.¹⁴⁵ . . . [C]omparing punitive-compensatory ratios with the biased sample of reported opinions dramatically elevates the ratios that appear to have been approved in the past. This could lead courts that rely on past reported decisions to assess punitive-compensatory ratios to approve ratios that are higher than the actual mass of punitive-compensatory ratios, as represented by the CTCN data.¹⁴⁶

The post-*BMW* set of awards, though driven downward by a change in law that imposed constitutional limits on punitive damages for the first time, is uniformly higher than the set of awards in the mass of tried cases predating *BMW*.¹⁴⁷

A judge looking at the mass of trial awards observes a median punitive-compensatory ratio of about 1.3 to 1. A judge looking only at awards in reported opinions observes a median ratio five to ten times higher.¹⁴⁸

This research suggests that the trial judge should exercise caution when looking at punitive damage awards in reported opinions.

BMW's Guidepost III is intended to give the defendant fair notice of what the state believes is appropriate punishment for the prohibited conduct. *BMW* also gives notice to the defendant by judicial decision, in any arena, that the prohibited conduct could give rise to severe punishment.¹⁴⁹ Presumably, notice

144. *Id.* at 409.

145. *Id.* at 414.

146. *Id.*

147. *Id.* at 415.

148. *Id.* at 415-16.

149. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996).

would include other large punitive damage awards for similar conduct by others. The judge can be fairly certain that a punitive damage award less than statutory penalties, such as triple damages, will clearly fall within the permitted range.

Less certain is how to translate a potential criminal sanction into a money judgment. Corporate officers may be willing to pay a very large sum to avoid prison. The judge needs to adjust for the higher standard of proof for criminal sanctions which may serve to reduce the likelihood of conviction. The judge's articulation of his or her reasoning and balancing is invaluable to the support of the ultimate conclusion.

When the Montana trial judge reviews a punitive damage award, the first step is consideration of Montana's statutory criteria. As suggested earlier, keeping the *BMW* guideposts in mind enables the trial court to consider most of the guideposts during its review of state standards.

Thereafter, the judge needs to consider the *BMW* guideposts not coextensive with Montana's statutory criteria to comply with due process. The judge should consider the hierarchy of reprehensibility noted above and relate it to the jury verdict. The trial judge must consider whether the jury improperly considered the defendant's actions in another state,¹⁵⁰ and the ratio of punitive damages to the compensatory award and the criminal penalties that could be imposed for comparative conduct. The trial court must give substantial deference to Montana law which sets maximum fines for certain prohibited conduct because the legislature has implicitly stated its view on the size of monetary penalties it deems sufficient to achieve both punishment and deterrence.

The court can also consider punitive damage awards in similar cases, even in other jurisdictions. The point made by *BMW* is that such awards place the defendant on notice of possible sanctions for misconduct.

Finally, given that the *Green Oil/Haslip* factors are still a valid constraint when properly applied, the Montana trial judge would be well advised to comment on the following factors if raised by the evidence:

- (1) The reasonableness of the relationship between the punitive

150. See *BMW*, 517 U.S. at 573 n.21 (noting it was error to use such evidence as a multiplier of damages, but "such evidence is relevant to the determination of the degree of reprehensibility of the defendant's conduct"). If this evidence is present, a cautionary instruction limiting such conduct to reprehensibility is appropriate.

- award and the harm likely to occur;
- (2) Duration of the defendant's wrongdoing;
 - (3) Defendant's awareness or concealment of his wrongdoing;
 - (4) Existence and frequency of similar past conduct; and
 - (5) All costs of litigation.¹⁵¹

IX. Summary

Commenting on the duty of the trial judge to review a jury's punitive damage award, the Supreme Court of New Mexico said that:

[T]ime and time again our appellate courts have come to the conclusion that the best way to arrive at a reasonable award of damages is for the trial judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case."¹⁵²

In the aftermath of *BMW*, the trial judge is faced with the difficult task of properly conducting the damage portion of a punitive damage trial. Where the judge's actions are potentially subject to scrutiny by the same U.S. Supreme Court that said a punitive to compensatory damage ratio of 4 to 1 comes "close to the line," then approved a 526 to 1 ratio, then reversed a 500 to 1 ratio, even the most seasoned judge may experience number numbness. When we overlay this federal due process uncertainty with state standards for reviewing punitive damages and jury instructions that are vague and laden with reversal potential, we see that the punitive damage trial judge needs to carefully manage the admission of evidence, jury instructions, and trial court review of punitive damage awards. Keeping in mind basic knowledge of punitive damage history, an abbreviated statement of the *Green Oil/Haslip* factors, the *BMW* guideposts, the MPDA suggestions, and the judge's state standards enables the judge to plot a course through the punitive damage thicket. Above all, the trial judge must conduct a comprehensive and independent review of the punitive damage award. In doing so, the trial judge gives the punitive damage award the coveted "strong presumption of validity"

151. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

152. See *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d, 1, 8 (N.M. 1998).

required by *Haslip*. No one wants to try the case again.

APPENDIX A
GREEN OIL/HASLIP FACTORS, *BMW* GUIDEPOSTS &
MPDA SUGGESTIONS

Green Oil/Haslip Factors:

- (1) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
- (2) The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
- (3) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss;
- (4) The "financial position" of the defendant;
- (5) All the costs of litigation;
- (6) The imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and
- (7) The existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

BMW Guideposts:

Guidepost I: Degree of reprehensibility—The degree of reprehensibility is the most important indicium of the reasonableness of punitive damages. A suggested hierarchy of reprehensible conduct is:

- (1) Nonviolent crimes are less serious than crimes marked by violence or the threat of violence,

- (2) Intentional trickery and deceit are more reprehensible than negligence,
- (3) Economic harm is less reprehensible than physical harm,
- (4) Repeated acts of prohibited conduct while knowing or suspecting that it was unlawful are more reprehensible than one instance of malfeasance, and
- (5) The omission of a material fact is less reprehensible than deliberately making a false statement. This is particularly true when there is a good-faith basis for believing that no duty to disclose exists.

Guidepost II: Ratio of punitive damage award to compensatory award—Exemplary damages must bear a “reasonable relationship” to compensatory damages, but a constitutional line cannot be marked by a simple mathematical formula. The size of the award can be one indication that the punitive damage award resulted from bias, passion or prejudice. However, it is not the sole or the most important sign.

The punitive damage award should consider not only the harm actually done but the harm likely to result from the defendant's conduct. The size, small or large, of the compensatory damage award could support a large punitive damage award; it is entirely dependant on the nature of the facts of the case. A higher ratio may be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.

Guidepost III: Sanctions for comparable misconduct—Consideration of the civil or criminal penalties that could be imposed for comparable misconduct accords substantial deference to state legislatures who have established maximum fines for certain prohibited conduct.

Model Punitive Damages Act:

The jury is instructed to consider any evidence that has been admitted regarding the following factors:

- (1) The nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) The amount of compensatory damages;
- (3) Any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (4) The defendant's present and future financial condition and the effect of an award on each condition;
- (5) Any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
- (6) Any adverse effect of the award on innocent persons;
- (7) Any remedial measures taken or not taken by the defendant since the wrongful conduct;
- (8) Compliance or noncompliance with any applicable standard promulgated by governmental or other generally recognized agency or organization whose function it is to establish standards; and
- (9) Any other aggravating or mitigating factors relevant to the amount of the award.

APPENDIX B
REVISED MONTANA PUNITIVE DAMAGE INSTRUCTION**INSTRUCTION NO. _____**

Punitive damages should be of such an amount as will deter the defendant from and warn others against similar acts of misconduct.

In determining punitive damages, you should consider each of the following matters:

- (1) The nature and reprehensibility of the defendant's wrongdoing. The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
- (2) The extent of the defendant's wrongdoing.
- (3) The intent of the defendant in committing the wrong.
- (4) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
- (5) The amount of actual damages awarded by the jury. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

- (6) The defendant's net worth.
- (7) If there have been other civil judgments against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.
- (8) Potential or prior criminal sanctions against the defendant based upon the same wrongful act should be taken into account in mitigation of the punitive damages award.
- (9) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
- (10) A higher ratio of punitive damages to compensatory damages is justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might be difficult to determine.
- (11) Any adverse effect of the award on innocent persons.
- (12) Any remedial measures taken or not taken by the defendant since the wrongful conduct.
- (13) Compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards.
- (14) Any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

GIVEN: _____